

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte CHRIS BOARDMAN

Appeal No. 2006-1571  
Application No. 09/730,266  
Technology Center 3623

HEARD: August 10, 2006

Before CRAWFORD, LEVY, and FETTING, Administrative Patent Judges.  
LEVY, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-18, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to a system and method for estimating product distribution using a product specific universe (specification, page 1).

In particular, it is disclosed (specification, pages 4 and 5) that

[A] method is provided for estimating the sales of specialty products. The method employs a two stage approach which includes defining a first product specific universe using wholesale purchasing data to determine a product specific store size for a first plurality of retail outlets and defining a second product specific universe using sampled retail sales data to determine a product specific store size for a second plurality of retail outlets. Geo-spatial projection is then applied to the first and second product specific universes to determine product specific projection factors for retail outlets in the first and second universe. The product specific projection factors are then applied to sampled retail sales data for the product to estimate the sales of the specialty product in unsampled retail outlets.

Claim 1 is representative of the invention, and is reproduced as follows:

1. A computer readable medium for estimating the sales of specialty products, the computer readable medium comprising instructions operable to perform the steps of:

defining a first product specific universe using wholesale purchasing data to determine a product specific store size for a first plurality of retail outlets;

defining a second product specific universe using sampled retail sales data to determine a product specific store size for a second plurality of retail outlets;

applying geo-spatial projection to the first product specific universe and the second product specific universe to

determine product specific projection factors for retail outlets in the first and second universe; and

applying said product specific projection factors to sampled retail sales data for the product to estimate the sales of said specialty product in unsampled outlets.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Felthauser et al. (Felthauser) 5,420,786 May 30, 1995

Berne, Supply Chain Savvy, Food Engineering, 1 August 1999

Claims 1-18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Felthauser<sup>1</sup> in view of Berne.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the answer (mailed December 21, 2005) for the examiner's complete reasoning in support of the rejection, and to the brief (filed December 14, 2005) and reply brief (filed February 23, 2006) for the appellant's arguments thereagainst.

Only those arguments actually made by appellant have been considered in this decision. Arguments which appellant could

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<sup>1</sup> Assigned to appellant.

have made but chose not to make in the brief have not been considered. See 37 CFR § 41.37(c)(1)(vii) (eff. Sept. 13, 2004).

OPINION

In reaching our decision in this appeal, we have carefully considered the subject matter on appeal, the rejection advanced by the examiner, and the evidence of obviousness relied upon by the examiner as support for the rejection. We have, likewise, reviewed and taken into consideration, in reaching our decision, appellant's arguments set forth in the briefs along with the examiner's rationale in support of the rejection and arguments in rebuttal set forth in the examiner's answer.

Upon consideration of the record before us, we make the determinations which follow. We note at the outset that the claims have been argued as a group. Accordingly, we select claim 1 as representative of the group.

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467

(1966). The examiner must articulate reasons for the examiner's decision. In re Lee, 277 F.3d 1338, 1342, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). In particular, the examiner must show that there is a teaching, motivation, or suggestion of a motivation to combine references relied on as evidence of obviousness. Id. at 1343. The examiner cannot simply reach conclusions based on the examiner's own understanding or experience - or on his or her assessment of what would be basic knowledge or common sense. Rather, the examiner must point to some concrete evidence in the record in support of these findings. In re Zurko, 258 F.3d 1379, 1386, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). Thus the examiner must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the examiner's conclusion. However, a suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art, as the teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated, in the references. The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill

in the art. In re Kahn, 441 F.3d 977, 987, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) citing In re Kotzab, 217 F.3d 1365, 1370, 55 USPQ2d 1313 (Fed. Cir. 2000). See also In re Thrift, 298 F. 3d 1357, 1363, 63 USPQ2d 2002, 2008 (Fed. Cir. 2002). These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. See id.; In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976).

The examiner's position (answer, page 3) that "sales data regardless of source is still sales data." The examiner asserts (answer, page 6) that Felthauser fails to teach using wholesale purchasing data. To overcome this deficiency of Felthauser, the examiner turns to Berne for a teaching of supply chain solutions from manufacturer to customer that includes wholesale distribution. The examiner adds that sales forecasts

and customer requirements "strongly suggest purchasing data of wholesalers since wholesalers will purchase products from the manufacturer or supplier" (answer, page 7). The examiner asserts (id.) that it would have been obvious to an artisan to include the wholesale purchasing data with the teachings of Felthauser since Felthauser teaches estimating sales activity of a product, and (id.) "Berne teaches that in order to achieve the level of agility and responsiveness we aspire to, it is essential that we have access to accurate, real-time information and greater visibility into the entire supply chain."

Appellant's position (brief, page 9) is that Felthauser's method is insufficient for estimating sales of a specialty product which has a non-uniform or inhomogeneous retail distribution pattern. It is argued (id.) that Felthauser does not disclose supplementing data from the "retail" universe outlets with data from a "wholesale" universe of outlets to obtain a more complete or valid description of the market. In particular, it is asserted (brief, page 10) that Felthauser does not show, teach or suggest "defining a first product specific universe using wholesale purchasing data to determine a product specific store size for a first plurality of retail outlets; defining a second product specific universe using sampled retail

sales data to determine a product specific store size for a second plurality of retail outlets." It is argued that Felthauser does not show, teach or suggest combining wholesale and retail store sizings for geo-spatial projection onto unsampled outlets. It is additionally argued (*id.*) that the examiner's statement "sales data regardless of source is still sales data" disregards the two distinct store sizings and subsequent combination of two geo-spatial projections that are required by appellant's claims.

Turning to Berne, appellant asserts that Berne relates to processes upstream of product manufacturing as opposed to appellant's invention which relates to downstream processes. It is asserted (brief, page 11) that the examiner mistakenly reads Berne as being related to estimating sales of specialty products in an inhomogenous or non-uniform marketplace. Appellant notes (*id.*) that Berne does not show any store sizing based on either wholesale or retail sales data and also does not show any geo-spatial projection to estimate sales of any product.

The examiner responds (answer, page 10) that "the 'sales forecast' and customer requirements strongly suggest purchasing data of wholesalers since wholesalers will purchase product

from the manufacturer or supplier (i.e., Kraft, Russell Stover Candies, Liberty Richter) based on their demand within the supply chain."

From our review of the record, we agree with appellant, for the reasons as generally set forth in the briefs, that the combined teachings of Felthauser and Byrne would not have suggested all of the limitations of appellant's claims. As acknowledged by both the examiner (answer, page 6) and by appellant (brief, pages 9 and 10), Felthauser does not disclose supplementing retail data with wholesale data and combining the two distinct (wholesale and retail) sets of data and applying geo-spatial projection to estimate sales of specialty products in unsampled outlets.

Turning to Berne, as noted by the examiner, Berne is directed to supply chain solutions which streamline operations (page 1). Berne discloses that accurate forecasting on their part is a critical element and that sophisticated modeling tools provide optimal flexibility in planning for the future (page 4). Berne additionally discloses (page 5) that historical data can no longer be relied upon for forecasting. Thus, we find that Berne, in discussing supply chain solutions, discloses the use of sophisticated modeling and analysis tools. However, we do not

know what specific data is used in the system modeling for making the supply chain more efficient. The fact that Berne uses sophisticated modeling tools is not a recognition of combining retail and wholesale sales data for estimating sales of specialty products which are not accurately estimated using retail data. We decline to speculate as to the specific data used by Berne's system modeling, particularly because Berne is directed to supply chain efficiencies and not to estimating the sales of specialty products. The examiner may not resort to speculation or unfounded assumptions to supply deficiencies in establishing a factual basis. See In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967). Accordingly, we find no teaching or suggestion in Berne of combining wholesale purchasing data with retail purchasing data and applying geo-spatial projection to estimate sales of specialty products, other than from appellant's disclosure. "Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor."

Para- Ordnance Mfg. v. SGS Importers Int'l, 73 F.3d 1085, 1087, 37 USPQ2d 1237, 1239 (Fed. Cir. 1995) (citing W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1551, 1553, 220 USPQ 303, 311, 312-13 (Fed. Cir. 1983)). "It is impermissible to use the claimed invention as an instruction manual or 'template' to piece

together the teachings of the prior art so that the claimed invention is rendered obvious." In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992) (citing In re Gorman, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991)).

We do agree with the examiner (answer, page 3) that "sales data regardless of source is still sales data." However, even though sales data can include both retail and wholesale sales data, the limitation of the claim regarding defining a first product specific universe using wholesale purchasing data cannot be ignored. Nor can this limitation, along with the other limitations regarding applying geo-spatial projections to the wholesale data to estimate sales of a specialty product in unsampled outlets be ignored.

From all of the above, we are not convinced that the Berne article cures the deficiencies of Felthauser, and agree with appellant (reply brief, page 2) that "the mere availability of wholesale purchasing data, does not suggest the combination of Felthauser and Berne for estimating retail product sales." Moreover, from our finding, supra, we find that even if we combined the teachings of Felthauser and Berns, that resultant structure would not result in the invention as claimed. The

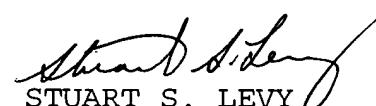
rejection of claim 1, and claims 2-6 which depend therefrom, under 35 U.S.C. § 103(a) is not sustained.

As independent claims 7 and 12 contain similar language, the rejection of claims 7-18 under 35 U.S.C. § 103(a) is not sustained.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-18 under 35 U.S.C. § 103 is reversed.

REVERSED

  
MURRIEL E. CRAWFORD )  
Administrative Patent Judge )  
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STUART S. LEVY ) BOARD OF PATENT  
Administrative Patent Judge ) APPEALS  
 ) AND  
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